Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-158

In the Matter of

Amendment of Section 73.202(b),	RM-8239
Table of Allotments,	RM-8317
FM Broadcast Stations.	
(Hazlehurst, Utica and	
Vicksburg, Mississippi)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 8, 1996; Released: February 22, 1996

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a *Petition for Reconsideration* ("Reconsideration"), filed by Donald Brady ("Brady") of the *Report and Order* ("R&O"), 9 FCC Rcd 6439 (1994), in the above-captioned docket.[1] Brady requests reconsideration of our action denying acceptance of his comments in response to the *Notice of Proposed Rule Making and Order to Show Cause* ("Notice"), 8 FCC Rcd 4080 (1993), in this proceeding. Willis Broadcasting Corporation ("Willis") filed an opposition to the reconsideration to which Brady filed reply comments.

2. *Background.* At the request of St. Pe' Broadcasting ("St. Pe'"), the *Notice* in this proceeding proposed to substitute Channel 265C3 for Channel 225A at Utica, Mississippi, and to modify the license for Station WJXN(FM) accordingly.[2] To accommodate the upgrade, St Pe' requested the substitution of Channel 225A for Channel 265C3 at Hazlehurst, Mississippi, and the substitution of Channel 267A for Channel 266A at Vicksburg, Mississippi. The *Notice* indicated the upgrade at Utica was a non-adjacent upgrade and, pursuant to Section 1.420(g) of the Commission's Rules, should another party indicate an interest in the C3 allotment at Utica, the modification could not be implemented unless an equivalent class channel was also allotted. The *Notice* also indicated that Station WMDC-FM, Channel 265C3, Hazlehurst and Station WBBV-FM, Channel 266A, Vicksburg, were entitled to reimbursement for reasonable costs in changing frequencies. St. Pe' indicated its willingness to reimburse both stations if granted its upgrade.

3. In response to the *Notice,* St. Pe' filed comments and a counterproposal to upgrade its station on Channel 265C2 in lieu of Channel 265C3. Brady also filed comments expressing an interest in Channel 265C3 at Utica, which were faxed to the Commission on the comment deadline but were stamped in by the Secretary's Office on the next day.[3]

4. Thereafter, the *R&O* determined that the *Notice* incorrectly indicated that comments expressing an interest in the use of Channel 265C3 would be accepted. The basis for this determination was that the upgrade at Utica and the substitution of Channel 225A for Channel 265C3 at Hazlehurst constituted an incompatible channel swap, thereby permitting the upgrade to be treated under the provisions of Section 1.420(g)(3) of the Rules and protecting it from competing expressions of interest. *See, e.g., Blair, Nebraska, et al.,* 8 FCC Rcd 4086 (1993). As a result, the *R&O* concluded that Brady's comments containing an expression of interest in Channel 265C3 at Utica would not be considered. The *R&O* also held that Brady's comments were not acceptable in other respects because they were late filed and did not contain a pledge to reimburse the Vicksburg and Hazlehurst stations for expenses incurred in changing channels to accommodate the allotment of Channel 265 at Utica.

5. *Petition for Reconsideration.* Brady now seeks reconsideration of the *R&O* on the grounds that substituting FM Channel 265C2 for Channel 225A and making other changes in the FM Table of Allotments is premised on three fundamental errors of law flowing from the refusal to consider supplemental pleadings filed in this proceeding: (1) the *Notice* in this proceeding is a final order and could not be modified; (2) the *R&O* failed to consider the reasons his comments were not received in the Secretary's Office until the day after the comment period ended; and (3) his expression of interest was not untimely.

6. Willis filed a timely opposition to the reconsideration. Willis points out that Brady raises the same arguments which were considered and resolved by the Commission's staff in the *R&O.* Willis argues that Brady has failed to meet the Commission's standards for reconsideration; that there are no new facts or changed circumstances. Willis concludes that the staff's action rejecting Brady's comments was correct and its substitution of Channel 265C2 for Channel 225A at Utica should be affirmed.

7. *Discussion.* As a threshold matter, we agree that the *R&O* did not consider the arguments made by Brady for late acceptance of his comments containing an expression of interest for Channel 265C3 at Utica. We have reviewed these arguments and believe that special circumstances warrant consideration of this pleading as timely filed. Specifically, a fire had prevented Brady's consulting engineer from filing the comments, and Brady had taken reasonable remedial measures prior to expiration of the comment deadline by faxing the comments to the Commission and arranging for a courier service to deliver a hard copy of the comments to the Commission. *See, e.g., Julian, CA,* 102 FCC 2d 27, 28-29 (1985).

8. However, the failure of the *R&O* to consider Brady's comments as timely filed constitutes, in our view, harmless error and does not affect the outcome of this proceeding for several reasons. First, contrary to Brady's argument, a

[1] Public Notice of the petition for reconsideration was given on December 21, 1995, Report No. 2047.

[2] An assignment of license for Station WJXN(FM), Utica, Mississippi, was granted on September 14, 1993, and consummated on October 21, 1993 (BALH-930714GE). Willis Broadcasting Corporation is the new licensee of Station WJXN(FM).

[3] After the pleading cycle ended, additional comments were filed by Brady, St. Pe', Willis, and Cross Roads Communications, which were not considered.

Notice of Proposed Rule Making in a notice and comment rulemaking proceeding is not a final order. Rather, it is "an interlocutory action which embodies no final decision but merely invites comment on matters interested persons may wish us to consider in reaching such decision." *Glenwood Springs, CO,* BC Docket No. 79-43, 46 RR 2d (Policy and Rules Div. 1980). *See also Riverside and Santa Anna, CA,* Docket No. 20727, 37 RR 2d 511 (Comm. 1976) (petition for reconsideration may not be filed against a Notice of Proposed Rulemaking because it is not a final action).

9. Further, it is well established that the final rule adopted need not be identical to the proposed rule. Rather, to comply with the requirements of Section 553(b)(3) of the Administrative Procedure Act,[4] it must be "a logical outgrowth of the rulemaking proceeding."[5] This means, in effect, that a notice of proposed rule making must "fairly apprise interested persons of the subjects and issues' before the agency"[6] or set forth a range of likely alternatives so that individuals may know whether their interests are "at stake."[7] We believe that the *Notice* adopted in this proceeding meets these tests because it apprised potential parties whose interests may be affected by St. Pe's proposed non-adjacent upgrade at Utica of the need to file comments, counterproposals, or competing expressions of interest in an upgraded channel at Utica. Further, the final rule was well within the range of likely alternatives proposed by the *Notice.* Although the *Notice* treated St. Pe's proposal as a non-adjacent upgrade, requiring the solicitation of competing expressions of interest, St. Pe' pointed out in its comments, and we agreed, that its proposal constituted an incompatible channel swap, thereby obviating the need for the solicitation of competing expressions of interest. Thus, what was proposed was beyond what we actually adopted.

10. Finally, we continue to believe that the *R&O* correctly concluded that St. Pe's counterproposal constituted an "incompatible channel swap" and is thus protected from competing expressions of interest consistent with the adjacent channel upgrade provision of Section 1.420(g)(3) of the Commission's Rules.[8] Although St. Pe' proposed to upgrade its Utica station on non-adjacent Channel 265C2, this upgrade was only possible if St. Pe' substituted its Channel 225A for Channel 265A at Hazlehurst, occupied by Station WMDC-FM. Furthermore, our engineering studies confirmed that there were no other Class C2 channels available at Utica other than Channel 265C2, and there were no other Class A channels available for substitution at the Hazlehurst station's transmitter site than Channel 225A. Brady had contended in a late filed pleading that was not accepted by the *R&O* that this was not an incompatible channel swap because Channel 225A was not the only channel that could be allotted at Hazlehurst.[9] Indeed, PDB Broadcasting filed a petition for rulemaking seeking the allotment of Channel 282A at Hazlehurst.[10] However, we believe that the *R&O* correctly addressed this argument by concluding that Channel 282A was not available and did not affect our conclusion that this was an incompatible channel swap. The *R&O* reached this conclusion because Channel 282A could not be utilized at the transmitter site of the Hazlehurst station and because it is longstanding Commission policy not to require a station to involuntarily relocate its transmitter site, absent consent from the permittee or licensee.[11] We continue to believe that this analysis was correct for two reasons. First, when the Commission adopted the adjacent channel upgrade rule and the incompatible channel swap policy, it stated that "[t]here is nothing unique about upgrading requests which affect existing allotment policies regarding channel substitutions."[12] As a result, stations were free to propose additional channel substitutions provided that they com-

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[4] 5 U.S.C. Section 553(b)(3). This section requires that "[g]eneral notice of proposed rule making shall be published in the Federal Register . . . " and that "it shall include -- either the terms or substance of the proposed rule or a description of the subjects and issues involved." Section 553(c) further requires that, after issuance of such a notice, interested parties shall have an opportunity to comment on the proposals. 5 U.S.C. Section 553(c).

[5] *See National Black Media Coalition v. FCC,* 791 F.2d 1016, 1022 (2d Cir. 1986) *quoting AFC-CIO v. Donovan,* 757 F.2d 330, 338 (D.C. Cir. 1985).

[6] *See American Iron & Steel Institute v. EPA,* 568 F.2d 284, 293 (3d Cir. 1977).

[7] *See Spartan Radiocasting v. FCC,* 619 F.2d 314, 321 (4th Cir. 1980) *discussing South Terminal Corp. v. EPA,* 504 F.2d 646, 659 (1st Cir. 1974).

[8] This rule permits a modification of a station's license on a mutually-exclusive higher class adjacent or co-channel without entertaining competing expressions of interest for the upgraded channel because operation on both the existing and superior channels is mutually exclusive. *See Modification of FM Broadcast License to Higher Class Co-Channels or Adjacent Channels,* 60 R.R. 2d 114, 120 (1986) (*"Adjacent Channel Upgrade Order"*). When the Commission adopted this rule, it also provided that, in limited circumstances, it would permit certain exchanges of non-adjacent channels to be covered by Section 1.420(g)(3). The Commission gave the following example:

> . . . [a} class A licensee operating on Channel 240A files a request to upgrade on Channel 271C2 and pro- poses to exchange channels with a licensee in another community currently operating on Channel 270A. . . . [A]lthough Channels 240A and 271C2 are not adjacent, nevertheless Channel 271C2 is not available in the *Ashbacker* sense for application by other interested parties, because Channel 270A must be replaced with Channel 240A in order for the upgrade to be possible.

Adjacent Upgrade Order, 60 R.R. 2d at 120. In other words, "[o]nly the licensee on Channel 240A could utilize Channel 271C2 in this scenario," because there are no other Class C2 channels available for the licensee of Channel 240A to upgrade on in its community other than Channel 271C2 and since there are no other Class A channels that could be substituted at the other community for Channel 270A other than Channel 240A. *Id.* Under these circumstances, the Commission concluded that there is no reason to entertain competing expressions of interest for the upgraded channel because ". . . the mutually exclusive relationship of the channels involved is similar to [an adjacent channel upgrade.]. *Id. See also* discussion of this example in *Blair, NE,* 8 FCC Rcd 4086 (Allocations Br. 1993); *Dyersburg, TN,* 4 FCC Rcd 4814, 4816 (1989).

[9] Supplemental Comments of Donald Brady, January 5, 1994, at 4-5.

[10] Donald Brady is a principal of PDB Broadcasting.

[11] MM Docket 85-156 at para. 8, 3 FCC Rcd 4037 (1988).

[12] *Adjacent Channel Upgrade Order,* 60 RR 2d at 120.

plied with other allocations policies and rules.[13] Second, we have held that an incompatible channel swap occurs when the channel being substituted at a community such as Hazlehurst is the only channel that works at the transmitter site of the station involved. *See e.g., Pikeville, KY,* 6 FCC Rcd 3732 para 3, 3733 n.6 (Allocations Br. 1991).

11. In view of the above, IT IS ORDERED, That the petition for Reconsideration filed by Donald Brady IS DENIED.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[13] *See e.g., Columbus, NE,* 51 FR 4926 (published February 10, 1986).